(9)

No. 93-5256

In the

Supreme Court of the United States

October Term, 1993

FREDEL WILLIAMSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the 11th Circuit

BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), bears adequate indicia of reliability to render it admissible under Rule 804(b)(3) and the Sixth Amendment Confrontation Clause?

2. Whether a post-arrest confession by an accomplice implicating a defendant, offered as an admission against penal interest of an unavailable declarant under Federal Rule of Evidence 804(b)(3), constitutes a firmly rooted hearsay exception rendering it presumptively reliable and not subject to further analysis under the Sixth Amendment Confrontation Clause?

3. Whether 804(b)(3)'s requirement that a statement must be corroborated by circumstances clearly indicating its trustworthiness, is subject to the further requirement of *Idaho v. Wright*, 497 U.S. 805 (1990), that the only circumstances that can be considered are those surrounding the making of the statement?

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INTEREST OF THE AMICI CURIAE

The issue here is whether the statements of a non-testifying accomplice, made while the accomplice was in custody and which were truly against the accomplice's penal interest, may be admitted in a separate trial against a defendant inculpated by those statements.

States have adopted provisions of law identical or similar to Federal Rules of Evidence 804(b)(3), which allow the admission of declarations against penal interest. How this Court interprets that rule in this case will have a significant impact on state law enforcement. Amici believe that when a statement is truly against penal interest, there are sufficient indicia of reliability to permit admission of the statement, consistent with the Confrontation Clause.

SUMMARY OF ARGUMENT

Modern Sixth Amendment jurisprudence has involved harmonizing the right of confrontation with the necessity of admitting reliable hearsay evidence. Because truth-finding is the central mission of the Confrontation Clause, a hearsay exception with adequate indicia of reliability meets the requirements of Confrontation. Under the Court's jurisprudence, a dispositive indicator of reliability is whether the exception is considered to be "firmly rooted" in the law. The determination whether a hearsay exception is firmly rooted turns on logic, experience and the length and breadth of its acceptance.

The exception for declarations against penal interest is firmly rooted because reason and experience show that individuals do not lightly make statements which can result in their convictions of crimes unless they believe the statements are true. The origin of the exception dates back nearly 300 years. It has been adopted by most American jurisdictions. A statement by an accomplice which qualifies as a declaration against penal interest satisfies the Confrontation Clause, regardless of custody status, and should be admitted on that basis. Reginald Harris' statements to DEA Agent Donald Walton qualified because they were truly against his penal

interest, they were voluntary and they were not the product of government inducement. They were properly admitted at petitioner's trial as declarations against penal interest.

ARGUMENT

I

A DECLARATION AGAINST PENAL INTEREST HAS ADEQUATE INDICIA OF RELIABILITY TO BE ADMITTED BECAUSE IT IS A FIRMLY ROOTED EXCEPTION TO THE HEARSAY RULE

A. The Supreme Court Has Interpreted the Confrontation Clause to Admit Evidence Which Comes Within a Firmly Rooted Exception to the Hearsay Rule.

For more than 100 years this Court has ruled that admission of some hearsay evidence which is within an exception to the hearsay rule does not violate the Confrontation Clause. Notably, this Court has held that hearsay evidence which comes within a firmly rooted exception to the hearsay rules does not violate the Confrontation Clause.

The hearsay exception for declarations against penal interest is firmly rooted because reason and experience show that individuals do not lightly make statements which can result in their convictions of crimes unless they believe the statements are true.

1. The Trend of Cases Supports Admission of Declarations Against Penal Interest.

The Court explained the reliability of evidence which came within a firmly rooted hearsay exception in *Ohio v. Roberts*, 448 U.S. 56 (1980). The case involved the use of a preliminary examination transcript at trial. The Court said that read literally, the language of the Sixth Amendment

would exclude all hearsay. However the historical evidence leaves little doubt the Confrontation Clause was intended to include some hearsay. *Id.*, at 63. Thus, the Court has recognized that competing interests, if closely examined, may dispense with confrontation at trial. *Id.*, at 64, citing earlier cases.

The Court further stated that the Confrontation Clause permits the admission of hearsay that is marked with such trustworthiness that "there is no material departure from the reasons of the general rule. *Id.*, at 65, quoting *Snyder v. Massachusetts*, 292 U.S. 97, 107 (1934). It noted that in *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972), the Court had said its concern was to insure there are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury in the absence of confrontation. *Id.*, at 65. Accordingly, a hearsay exception must rest upon such solid foundation that admission of virtually any evidence within it comports with the substance of constitutional protection. *Id.*, at 66. It noted that Confrontation Clause concerns and the hearsay rule are designed to protect similar values and stem from the same roots. *Ibid.* Reliability can be inferred without more in a case where the evidence falls within a "firmly rooted hearsay exception." *Ibid*, emphasis added. In other cases, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness. *Ibid.*

The holding in *Roberts* followed from a line of cases which found that reliable hearsay evidence is admissible. In *California v. Green*, 399 U.S. 149, 157-159 (1970), the Court upheld the constitutionality of the hearsay exception for prior inconsistent statements. As far back as 1892 the Court admitted a hearsay statement in the form of a dying declaration. *Mattox v. United States*, 146 U.S. 140, 152 (1892). In the second *Mattox* case the Court upheld admission of the hearsay statement over a claim of denial of confrontation, stating that "technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

Prior to *Roberts* the Court had repeatedly upheld admission of declarations against penal interest as reliable hearsay. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court upheld admission of a co-conspirator's statement. A plurality of the Court found the exception was a "long established and well-recognized rule of state law," and also found that the statement was against the declarant's penal interest. *Id.*, at 83, 89.

Thereafter, in discussing declarations against penal interest, the Court stated in *United States v. Harris*, 403 U.S. 573 (1971):

> People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility - sufficient at least to support a finding of probable cause to search. At 583.

In *Chambers v. Mississippi*, 410 U.S. 284, 300-301 (1973) this Court ruled that hearsay statements offered by the defendant should have been admitted because they were against the declarant's penal interest. Thereafter, in *United States v. Matlock*, 415 U.S. 164 (1974), the declaration by a woman included a statement she cohabited with the defendant, to whom she was not married. This Court found the statement admissible, noting that such cohabitation would not seem to be a relationship to which one would falsely confess since it was a crime in the state where the declaration was made. Accordingly, her "statements were against her penal interest and they carried their own indicia of reliability. This was sufficient <u>in itself</u> . . . to warrant admitting [the statement] to evidence for consideration by the trial judge." *Id.*, at 176, emphasis added.

2. <u>Douglas and Bruton</u>

There is apparent tension between the line of cases discussed above which support admission of declarations against interest as reliable hearsay evidence and two cases from the 1960s which appear to say that statements from an accomplice which implicate another are always unreliable, regardless of whether they are against the accomplice's penal interest or not.

In *Douglas v. Alabama*, 380 U.S. 415 (1965), the defendant and the declarant were in the same car from which a single bullet was fired at the victim. The declarant told police that the defendant had fired the shot. The men were tried separately and the declarant refused to testify at defendant's trial. His statement was admitted under the guise of cross-examination. This Court ruled that admission of the statement was error since the inability of the defendant to cross-examine the declarant denied him the right of cross-examination secured by the Confrontation Clause. *Id.*, at 419. It should be noted, however, that the statement was not against the declarant's penal interest, since in it he shifted the blame for firing the single shot to the defendant.

Bruton v. United States, 391 U.S. 123 (1968) is a case often cited for the proposition that an accomplice's statements are unreliable. There the defendant had been tried with William Evans. A postal inspector testified that while in custody Evans confessed to him that he and the defendant committed the armed robbery.[1] The defendant's conviction was affirmed by the circuit court because the trial judge instructed the jury not to consider Evans' statement against the defendant.

Certiorari was granted to reconsider *Delli Paoli v. United States*, 352 U.S. 232 (1957), which had upheld the conviction of a defendant in a joint trial where the jury was instructed to disregard the co-defendant's confession in judging the defendant. *Bruton* at 123-124, 125. The Supreme Court noted that Evans' statement was hearsay and was inadmissible against the defendant under traditional rules of

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[1] Evans' conviction was reversed by the circuit court because the confession was tainted by a prior involuntary confession. He was acquitted on retrial. *Id.*, at 133, fn. 9.

evidence. Significantly, it added that no recognized exception to the hearsay rule was before it, and it intimated "no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." *Id.*, at 128, fn. 3.

Reversal was predicated on the views expressed by Justice Roger Traynor of the California Supreme Court in *People v. Aranda*, 63 Cal.2d 518, 528-529, 407 P.2d 265, 271-272 (1963). This Court quoted Justice Traynor's opinion to the effect that the jury cannot be expected to perform the overwhelming task of considering an admissible confession against one party and ignoring it in determining the guilt or innocence of the other. *Bruton* at 131.

Justice White, in dissent, spoke more expansively. His position was that the confession was not admissible against the defendant because it was inadmissible hearsay. *Id.*, at 138. Since there was nothing in the record to suggest the jury did not follow the trial court's instruction not to consider it against defendant, he would have affirmed the conviction. *Id.*, at 139. Then, in dicta, he said "[a]s to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally . . . . Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay." *Id.*, at 141.

3. *Lee v. Illinois*

The tension between the two lines of cases surfaced in *Lee v. Illinois*, 476 U.S. 530 (1986). This was a five to four opinion which involved admission of a co-defendant's confession in a joint trial. The majority found that the co-defendant's statement, as a confessing accomplice, was presumptively unreliable absent sufficient "indicia of reliability" to overcome the presumption. *Id.*, at 539. Referring to the dissent in *Bruton*, the Court elaborated that the truth-finding function of the Confrontation Clause is threatened when an accomplice's confession is sought to be introduced without cross-examination. The Court found the

confession was unreliable because the co-defendant confessed only after he was told the defendant had confessed; implicated him, and then only when the defendant implored him to "share the rap." *Id.*, at 544. In a footnote the majority rejected the state's characterization of the confession as a "declaration against penal interest," adding that it viewed the concept as too large a class for Confrontation Clause analysis.

In dissent, Justice Blackmun, joined by then-Associate Justice Rehnquist and two other justices, found there were more than adequate "indicia of reliability" to allow admission of the statement, above all, that the statement was thoroughly and unambiguously adverse to the declarant's penal interest. *Id.*, at 551. The dissent noted that while the Court has treated the confessions of codefendants with suspicion, it has not held such confession *per se* inadmissible under the Confrontation Clause. Accomplice confessions ordinarily are untrustworthy because they are not unambiguously adverse to the penal interests of the declarant. *Id.*, at 552-553.

Thereafter, the Court decided *Idaho v. Wright*, 497 U.S. 805 (1990), which involved a physician testifying to a statement by a child under the "residual exception" to the hearsay rule. The Court reaffirmed *Roberts'* holding that if evidence is offered under a hearsay exception, once the declarant is shown to be unavailable, the statement is admissible only if it bears adequate "indicia of reliability." This is where either the evidence falls within a firmly rooted hearsay exception, or there are particularized guarantees of trustworthiness. *Wright*, at 814-815. This Court concluded that the residual exception was not firmly rooted, since, as a catch-all by definition, its components do not share the same tradition of reliability that supports admissibility for an established exception. *Id.*, at 817.

B. The Declaration Against Penal Interest Has Become a Firmly Rooted Exception to the Hearsay Rule.

While the issue of whether the declaration against penal interest is a firmly rooted exception has not been answered by this Court, it should be resolved in the affirmative. The

against interest exception traces its roots to the beginning of the hearsay rule. The rejection of the exception in a nineteenth century English ruling was illogical, rejected by commentators, and overturned over a period of years. Experience and reason show that people are unlikely to make statements which are truly against their penal interest unless they believe them to be true. More than 70% of the states admit inculpatory declarations against penal interest. The Federal Rules of Evidence specifically provide for admission as well. A number of courts have specifically found the exception is firmly rooted. Based on its rationale, its long history and its widespread adoption, the exception should be recognized as firmly rooted.

1. Rationale for Admission of Declarations Against Penal Interest

The rationale for admission of declarations against penal interest is the same as most other hearsay exceptions: necessity and reliability. Because the fact finder would lose the benefit of the evidence, since the declarant is unavailable and this evidence cannot be obtained from some other source, admission of reliable hearsay evidence is better than the total absence of evidence on the issue. 5 J. Wigmore, Evidence, § 1421, p. 253 (J. Chadbourn rev. 1974).

Reliability flows from the belief that the self-inculpating nature serves as a substitute for the oath and cross-examination. The rationale of the declaration against interest exception is that people usually do not make statements against their interest unless they believe them to be true. *Lee*, at 551 (Blackmun, J., dissenting); see also, 5 Wigmore, Evidence, § 1422, pp. 253-254.

2. Early Exclusion of Declarations Against Penal Interest

Wigmore explains that the prohibition on the admission of hearsay evidence occurred during the time of the Restoration, about 1675 to 1690. The exclusion of hearsay was based on the fact that the other side could not cross-

examine the witness. 5 Wigmore, Evidence § 1364, pp. 18, 20. Approximately at this same time exceptions to the hearsay rule began to develop.

The purpose of the hearsay rule is the key to its exceptions. As stated by this Court in *Idaho v. Wright*:

> The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness so that the test of cross-examination would be a work of supererogation.

Id., at 819, quoting 5 Wigmore, Evidence, § 1420, p. 251. The declaration against interest exception can be traced back as early as any other exception. 5 Wigmore, Evidence § 1455, pp. 323-324. It has two separate origins. On one side, it became customary after the hearsay rule was established to receive in evidence the account entries of a deceased person charging himself with the receipt of money. The second source was a series of rulings on receiving oral declarations in disparagement of one's proprietary title. The lines of precedent proceeded independently until about the beginning of the nineteenth century when acceptance was gained for the principle that all declarations of facts against interest by deceased persons were to be received. 5 Wigmore, Evidence, § 1476, p. 350.

In the much-criticized *Sussex Peerage Case*, (11 Clark & F. 85, 8 Eng. Rept. 1034 (1844)), the House of Lords held that the against interest exception did not include statements of fact subjecting the declarant to criminal liability, but was

confined to statements of facts against either pecuniary or proprietary interest.[2]

The exclusion of declarations against penal interest was accepted by most American courts. 5 J. Wigmore, Evidence § 1476, p. 352, and cases cited at footnote 9. In *Donnelly v. United States*, 228 U.S. 243 (1913) the Court refused to admit a statement in which the deceased declarant admitted the killing for which the defendant was convicted because the statement was against the declarant's penal interest, rather than his pecuniary or proprietary interest. *Id.*, at 273. In dissent Justice Holmes said "no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man." *Id.*, at 278.

3. Acceptance of Declarations Against Penal Interest.

Although the rule of the *Sussex Peerage Case* became the majority rule in the United States, a number of courts rebelled against its irrationality. In *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923), the Virginia Supreme Court held that evidence of an extra-judicial confession which was exculpatory of the accused and made by an unavailable witness was admissible as an exception to the hearsay rule. The Virginia court reaffirmed the holding in *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E. 2d 318 (1950). In *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945), the Missouri Supreme Court accepted an out-of-court statement in

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[2] Declarations against penal interest by living persons had been found admissible, prior to the *Sussex Peerage Case*, in *Standen v. Standen*, Peake 32 (1791) where a marriage register entry recited the publication of banns and the clergyman's confession he had married without banns, and *Powell v. Harper*, 5 Car. & P. 590 (1833), a libel charging the plaintiff with being a receiver of stolen goods and a statement by a declarant that the declarant had stolen them. 5 Wigmore, Evidence, § 1476, pp. 351-352, fn. 8.

which the declarant admitted to perjury in his testimony at a prior trial. The court held that sound reasons required the exception to the hearsay rule be extended to this character of declaration, as in every realistic sense it is a statement against the declarant's interest and unlikely to be either deliberately false or heedlessly incorrect. *Id.*, at 289, 290.

In *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952), the Illinois Supreme Court admitted a confession, and held to exclude it would be absurd and shocking to all sense of justice. The New Jersey Supreme Court accepted a declaration against penal interest in *Band's Refuse Removal, Inc. v. Borough of Fair Lawn*, 62 N.J. Super. 522, 163 A.2d 465 (App. Div. 1960), noting the statement was clearly against the declarant's interest and had every indicia of trustworthiness. *Id.*, at 485, 486. In an opinion written by Justice Traynor, the California Supreme Court admitted a declaration against penal interest. *People v. Spriggs*, 60 Cal.2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964). The New York rule was modernized in *People v. Brown*, 26 N.Y.2d 88, 257 N.E.2d 16 (1970), to permit declarations against penal interests. Federal courts found the prohibition on declarations against penal interest an "indefensible limitation" (*United States v. Annunziato*, 293 F.2d 373, 378 (2nd Cir. 1961) cert. denied 368 U.S. 919) and stated that modern authorities support the admission of such statements (*Mason v. United States*, 257 F.2d 359, 360 (10th Cir. 1958), cert. denied 358 U.S. 831). "[A]n increasing amount of decisional law recognize[d] exposure to punishment for crime as a sufficient stake [for admission]." Advisory Committee's Note to the Preliminary Draft of the Proposed Rules of Evidence, 46 F.R.D. 161, 386 (1969).

Statutes also began to accept declarations against penal interest. Rule 509 of the Model Code of Evidence, adopted by the American Law Institute on May 15, 1942, provided, in pertinent part:

> (1) A declaration is against the interest of a declarant if the judge finds that the fact asserted in the declaration was at the time of the declaration . . . so far subjected him to . . .

> criminal liability . . . that a reasonable man in his position would not have made the declaration unless he believed it to be true.

The states of California, Kansas and New Jersey adopted provisions that admitted declarations against penal interest.[3]

4. Federal Rules of Evidence Rule 804(b)(3)

Adoption of the Federal Rules of Evidence began with the appointment of an advisory commission in 1961 to study the advisability of uniform rules of evidence in federal court. A preliminary draft was circulated in March 1969. Proposed Rule 804(b)(4) expanded the against interest exception to reach statements against penal interest. Louisell and Mueller, Federal Evidence, § 485, p. 987 (1980). The Advisory Committee's notes stated that "exposure to criminal liability satisfies the against-interest requirement." Preliminary Draft at 385. However the preliminary draft specifically excluded inculpatory declarations. Preliminary Draft at 378.[4] The Advisory Committee's Notes explained the dissenting opinion in *Bruton* was the reason for this prohibition. It noted that the majority in *Bruton* assumed the inadmissibility of the implicating confession and centered its discussion on the

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[3] California Evidence Code § 1230 (adopted 1965); Kansas Statutes Annotated § 60-460(j) (adopted 1963); New Jersey Evidence Rule 63(10) (adopted 1967).

[4] The are two broad categories of declarations against penal interest, "inculpatory declarations" and "exculpatory declarations". The former refers to a statement that inculpates a defendant in a crime and the latter to a statement that seeks to relieve the defendant of guilt. See, Comment, Federal Rules of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest. 66 Calif. L. Rev. 1189, 1190 fn. 7 (1978).

effectiveness of a limiting instruction. Preliminary Draft at 386.[5]

However, the Rules of Evidence as promulgated by this Court on November 20, 1972, eliminated the prohibition on inculpatory declarations. It authorized admission of a "statement which was at the time of its making . . . so far tended to subject him to . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Proposed Rules of Evidence, 56 F.R.D. 184, 321 (1972). The Proposed Rules imposed a corroboration requirement on exculpatory declarations. *Ibid.*[6]

When the Proposed Rules were submitted to Congress, the House Judiciary Committee reinserted the ban on the admission of inculpatory statements. The Committee explained that it did so to codify what it believed was the holding of *Bruton*. Report of the House Committee on the Judiciary, reprinted in K. Redden & S. Saltzburg, Federal Rules of Evidence Manual 326 (1975). The Senate Judiciary Committee removed this prohibition on inculpatory declarations, stating:

> Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. . . .

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[5] This provision and rationale also appeared in the Revised Draft of Proposed Rules of Evidence, 51 F.R.D. 315, 438-439, 444 (1971).

[6] The Advisory Committee's Notes explained that while the common law's refusal to concede the adequacy of penal interest was illogical, there was the a distrust of evidence of fabricated confessions exculpating another. The Committee stated "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." *Id.*, at 327.

Report of the Senate Committee on the Judiciary, reprinted in Redden at 328. The Conference Committee accepted the Senate amendment, "reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." Report of the House and Senate Conferees, reprinted in Redden at 329.

Thus, in its final form adopted by Congress, Rule 804(b)(3) authorizes admission of statements against penal interests in which the declarant inculpates the defendant. Moreover, the Advisory Committee's Notes specifically state that statements which are truly against penal interest are admissible. Comment, Federal Rules of Evidence 804(b)(3) at 1198.

C. Widespread Acceptance of Declarations Against Penal Interest

Federal Rules of Evidence 804(b)(3) has been adopted in a form that admits inculpatory declarations by 27 states and the Military Rules of Evidence.[7] It will become effective in

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[7] Alaska Rules of Evidence Rule 804(b)(3); Arizona Rules of Evidence Rule 804(b)(3); Colorado Rules of Evidence 804(b)(3); Delaware Uniform Rules of Evidence Rule 804(b)(3); Florida Evidence Code § 90.804(2)(c) (pursuant to c. 90-174, § 4); Hawaii Rules of Evidence Rule 804 (b)(3); Idaho Rules of Evidence Rule 804(b)(3); Indiana Rules of Evidence Rule 804(b)(3); Iowa Rules of Evidence Rule 804(b)(3); Louisiana Code of Evidence Art. 804(B)(3); Michigan Rules of Evidence Rule 804(b)(3); Minnesota Rules of Evidence Rule 804(b)(3); Mississippi Rules of Evidence Rule 804(b)(3); Montana Rules of Evidence Rule 804(b)(3); Nebraska Rules of Evidence § 27-804(2)(c); New Hampshire Rules of Evidence Rule 804(b)(3); New Mexico Rules of Evidence Rule 804(b)(3); Oklahoma Evidence Code § 2804(B)(3); Oregon Rules of Evidence § 40.465(3)(c); Rhode Island Rules of Evidence Rule 804(b)(3), South Dakota Codified Laws § 19.16-32; Tennessee Rules of Evidence Rule

a 28th state, Maryland, on July 1, 1994.[8] Four other states have adopted it with a provision that inculpatory statements must be corroborated.[9] Two states and two territories have adopted similar provisions which permit admission of inculpatory declarations against penal interest.[10] Inculpatory declarations against penal interest have also been accepted by the courts of at least three states and the District of Columbia.[11]

In summary, 36 states, two territories, the District of Columbia and the Military courts all admit inculpatory

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804(b)(3); Utah Rules of Evidence Rule 804(b)(3); Washington Rules of Evidence Rule 804(b)(3); West Virginia Rules of Evidence Rule 804(b)(3); Wisconsin Stat. Ann. § 908.045(4); Wyoming Rules of Evidence Rule 804(b)(3); and Military Rules of Evidence Rule 804(b)(3), 45 Fed. Reg.16,932. See, Evidence in America, The Federal Rules in the States.

[8] Maryland Rules of Procedure, Evidence, Rule 5-804(b)(3).

[9] Kentucky Rules of Evidence Rule 804(b)(3); North Carolina Rules of Evidence Rule 804(b)(3); Ohio Rules of Evidence Rule 804(b)(3); and Texas Rules of Criminal Evidence Rule 803(24).

[10] California Evidence Code § 1230; Kansas Statutes Annotated § 60-460(j); Puerto Rico Rules of Evidence 64(B)(3); and Virgin Islands Code Ann. tit. 5 § 932(10).

[11] Massachusetts: *Commonwealth v. Carr*, 373 Mass. 617, 369 N.E. 2d 970, 974 (1977); New York: *People v. Brown*, 26 N.Y.2d 88, 91, 308 N.Y.S. 825, 826-827, 257 N.E. 2d 16, 17-19 (1970); Pennsylvania: *Commonwealth v. Nash*, 457 Pa. 296, 324 A.2d 344, 346 (1974); and the District of Columbia: *Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979).

declarations against penal interest. Several state courts have held that the exception is firmly rooted. *People v. Wilson*, 17 Cal.App.4th 271, 278, 21 Cal.Rptr.2d 420 (1993) [California Evidence Code section 1230 is firmly rooted in the law], *State v. Jankiewicz*, 831 S.W.2d 195, 198 (1992 Mo. banc.), *State v. Cook*, 135 N.H. 668, 610 A.2d 800, 808 (1992) (concurring opinion of Thayer, J, "would seem to be firmly rooted"), *State v. Sego*, 266 N.J. Super. 406, 414, 629 A.2d 1362, 1367 (App. Div. 1993), *State v. Tucker*, 109 Ore.App. 519, 526, 820 P.2d 834, 838 (1991).

The First, Second, Seventh, Eighth, Tenth and Eleventh circuits have also found that the exception is firmly rooted. *United States v. Seeley*, 892 F.2d 1, 2 (1st Cir. 1989)[12], *United States v. Katsougrakis*, 715 F.2d 769, 775 (2nd Cir. 1983), *United States v. York*, 933 F.2d 1343, 1363 (7th Cir. 1991), *Berrisford v. Wood*, 826 F.2d 747, 751 (8th Cir. 1987), cert. denied 484 U.S. 1016, *Jennings v. Maynard*, 946 F.2d 1502, 1505 (10th Cir. 1991), *United States v. Taggart*, 944 F.2d 837, 840 (11th Cir. 1991).

On the other hand, the exception has met with considerable resistance in the Fifth Circuit, which has held that the exception is not firmly rooted. *United States v. Flores*, 985 F.2d 770, 775-776 (5th Cir. 1993); *United States v. Sarmiento-Perez*, 633 F.2d 1092 (5th Cir. 1981).

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[12] Despite holding that the exception is firmly rooted, *Seeley* also grafted a corroboration requirement to declarations against penal interest. *Id.*, at 2, see also discussion in *United States v. Fields*, 871 F.2d 188, 192 (1st Cir. 1989). This seems inconsistent with *Roberts*, because the hallmark of a firmly rooted exception is that if evidence satisfies its requirements, no corroboration is required. 448 U.S. at 66. In view of *Idaho v. Wright*, *supra*, which limits corroboration to the circumstances surrounding the making of the statement, this dispute may be no more than semantic. If the circumstances surrounding the making of the declaration are sufficient to meet the requirements of the exception, the statement is admissible without further corroboration.

II

REGINALD HARRIS' STATEMENTS WERE ADMISSIBLE AS DECLARATIONS AGAINST PENAL INTEREST.

A. Requirements for the Exception

Federal Rule 804(b)(3) requires as a threshold matter that the declarant be unavailable. As to its against interest provision, the statement must have, at the time it was made, so far tended to subject the declarant to criminal liability that no reasonable person in the declarant's position would have made the statement unless believing it was true. Rule 804(b)(3).

Whether a statement is in fact against interest must be determined from the circumstances of each case. Advisory Committee's Notes, Proposed Rules, 56 F.R.D. at 328. As stated in *People v. Gordon*, 50 Cal.3d 1223, 1251, 792 P.2d 251, 270 Cal.Rptr. 451 (1990):

> The decision whether trustworthiness is present [in a declaration against penal interest] requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception. Such an endeavor allows, in fact demands, the exercise of discretion.

See also, *People v. Frierson*, 53 Cal.3d 730, 745, 808 P.2d 1197, 280 Cal.Rptr. 440 (1991).

The case law indicates the factors the courts look upon in making this determination are (1) whether the statement is truly against interest or whether instead the declarant trivializes his role and shifts primary blame to the person he inculpates, (2) whether the statement is made when there are inducements from the government (which relates to whether the statement was not contrary to the declarant's interest), and (3) whether the statement is voluntary. See also, McCormick

on Evidence (4th Ed. 1992), § 319, pp. 343-346, Note: Declarations Against Penal Interest: Standards of Admissibility Under an Emerging Majority Rule, 56 Boston University Law Review 148 (1976).

B. Application of the Factors

1. Truly Against Penal Interest

To be admissible as a declaration against penal interest, the statement must truly be against the declarant's penal interest. The holdings of federal and state courts applying Rule 804(b)(3) and its state equivalents illustrate this test. For example, in *United States v. Taggart*, 944 F.2d 837 (11th Cir 1991) Woods told a Secret Service agent that he bought marijuana from the defendant. When he paid her with a $100 bill, Woods said he was given seven counterfeit $10 bills as change. The agent testified as to Woods' statement. The Eleventh Circuit applied Federal Rule 804(b)(3) and held Woods' statement was contrary to his penal interest because it implicated him in the marijuana transaction. *Id.*, at 840.

United States v. Garris, 616 F.2d 626 (2nd Cir. 1980), cert. denied 447 U.S. 926 involved a defendant who took part in a bank robbery and told his sister, Phyllis, of his participation. Phyllis concealed that she knew how to reach him from the FBI. Phyllis worked at a bank; the defendant told her he needed $5,000 to evade police and would send someone to her teller window for it. When a woman appeared at Phyllis' window and demanded money, she gave her $5,000. Following that robbery Phyllis voluntarily went to the FBI and made a statement inculpating her brother. She claimed lack of memory at defendant's trial. The Second Circuit found the statement was against Phyllis' interest since it was an admission of being an accessory with knowledge of the offense. *Id.*, at 630. The court noted that the Advisory Committee stated that whether a statement is in fact against interest must be determined from the circumstances of each case. *Id.*, at 631-632. Here the court found (1) that nothing in the record suggested that Phyllis was given any reason to believe a statement which inculpated another would help her;

and (2) the statement was not calculated to sacrifice defendant so as to aid her. *Id.*, at 633.

In *People v. Wilson*, *supra*, the defendant was arrested after shooting at occupants of a vehicle. He called his wife from jail and told her he "had shot some Mexicans." He directed her to the hidden gun and told her how to dispose of it, which she did. She advised police about this, but refused to testify at trial. *Id.*, at 274. Her statement to the police was admitted against her husband. The court upheld admission of the statement since it was against her penal interest. At the time she concealed the weapon she was aware her husband had used the gun to commit a felony, and her concealment of the weapon made her an accessory under California Penal Code section 32. *Id.*, at 276.

In *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1991), cert. denied 112 S.Ct. 1243, the defendant and Wade were charged with the kidnapping, robbery and murder of two high school students. Wade gave a statement to police which set out the facts and incriminated himself and the defendant. Wade was tried separately, received a life term, and refused to testify at the defendant's trial. His statement was admitted pursuant to Kentucky Rules of Evidence Rule 804(b)(3).

The Kentucky Supreme Court upheld admission of the statement, finding the declarant, Wade, admitted his active participation in the crimes. *Id.*, at 75. The fact the declarant initially denied involvement and confessed only after being told he had failed a polygraph and had been identified did not affect his statement. *Ibid.*

In contrast, courts have excluded statements which were primarily exculpatory of the declarant. For example, in *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978), the defendant was charged with forging a treasury check payable to Clayton Meeks. A Secret Service agent interviewed the defendant's husband, who was the prime suspect. He said that the defendant asked him to sign the check since it was owed to her as child support, and that the defendant helped him forge Meeks' name on the check. At trial, the defendant claimed that her husband had committed the forgery. Her husband's statement to the agent was admitted against her.

The Eighth Circuit ruled that the statement was not a declaration against penal interest because it was only partly against the husband's interest. While the husband admitted writing Meeks' name on the check, his statement was intended to shift suspicion away from him and to alter the impact of his admission he signed Meeks' name. *Id.*, at 187.

Similarly, in *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) the circuit court held that the declarant's statement naming the defendant in a drug case was not against interest. At the time he made the statement the declarant had already been convicted, and no statement he made was going to subject him to further liability. *Id.*, at 1273. See also, *United States v. Love*, 592 F.2d 1022, 1025-1026 (8th Cir. 1979).

In *State v. Hansen*, 312 N.W.2d 96 (Minn. 1981), a reward was offered after shots were fired at guards at a construction site. Harold Fischer was interviewed by police and told that if he gave a statement the state would not charge his wife or daughter, and he would be charged with a misdemeanor instead of attempted murder. Fischer described a meeting at his house where it was decided to shoot up the construction site. He said he went to the site but did not fire any shots, and the defendant was one of the shooters. Fischer refused to testify at trial and his statement was introduced as a declaration against penal interest.

The Minnesota Supreme Court stated that it was not convinced that Fischer's statement was against penal interest. The court noted that the statement was made after a promise of leniency and it was primarily exculpatory of his conduct. *Id.*, at 101.[13]

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[13] Petitioner portrays this case as holding that Minnesota, inter alia, has excluded declarations against penal interest through judicial opinion. Pet.Br., pp. 19-20, fn. 5. As can be seen the statement was only excluded because it failed to meet the requirements for penal interest exceptions. In fact *Hansen* reaffirmed that a declarant's statement to police can qualify as a declaration against penal interest when there is no promise of leniency. *Id.*, at 101, citing to *State v. Black*, 291 N.W.2d 208, 213 (Minn. 1980). Petitioner makes the same incorrect representation as to *State v. St. Pierre*, 111 Wash.2d 105, 759 P.2d 383 (1988), discussed *infra*.

2. Government Inducements

The fact that a declaration was made without any inducement from law enforcement is frequently cited as a basis for admitting a declaration against interest. The issue goes to the heart of whether the statement is contrary to interest. When incentives for a statement are offered, statements are often excluded.

For example, in *United States v. Garcia*, 897 F.2d 1413 (7th Cir 1990), Carlos Garcia and Jose Garcia were stopped for speeding. A search of their vehicle pursuant to consent yielded marijuana. Carlos Garcia was arrested, advised of his constitutional rights and gave statements which implicated himself and Jose Garcia in transportation of marijuana and conspiracy. Carlos Garcia later pled guilty and his statement were used against Jose Garcia. The statement was clearly against Carlos' penal interest. Admission was upheld by the Seventh Circuit, which found there was nothing in the record which indicated Carlos acted under a motivation to curry favor. He voluntarily made the statements after advisement of his constitutional rights, and did not enter into any plea agreement for his statement. *Id.*, at 1421.

There was also no government inducement in *United States v. Vernor*, 902 F.2d 1182 (5th Cir. 1990), cert. denied 498 U.S. 922. There the defendant and his father committed a bank robbery, with the defendant acting as the getaway driver. Declarant was identified (dye package exploded), arrested and, after the advisement of his constitutional rights, gave a statement to the police which implicated himself and the defendant. The Fifth Circuit concluded the declarant would not have made the statement unless it was true. Faced with overwhelming evidence of his own guilt, he took full responsibility for his part and did not try to shift the blame to the defendant. There was nothing to show that he was

attempting to curry favor or was trying to enter into a plea agreement. *Id.*, at 1188. See also, *Garris* at 633.

In *State v. Earnest*, 106 N.M. 411, 744 P.2d 539 (1987), the declarant and another were arrested and charged with murder. The declarant told police he had cut the victim's throat and the defendant had shot the victim in the head. The declarant refused to testify at trial. The New Mexico Supreme Court held that the statement was reliable because (1) the declarant had made the statement without any offer of leniency; (2) he admitted trying to cut the victim's throat, which at the time was thought to have been the cause of death and which could have subjected him to the death penalty, and (3) he did not try to shift responsibility to the defendant, but instead implicated all participants. *Id.*, at 540.[14]

On the other hand, courts have excluded statements which were made upon an offer of leniency. In *United States v. Magana-Olvera*, 917 F.2d 401 (9th Cir. 1990) the declarant was arrested after selling drugs to an undercover agent. The agent told him that in exchange for cooperation he might receive a lenient treatment. The declarant identified the defendant as his supplier. The following week, while in jail. the agent told declarant that a formal agreement would be drawn up between the declarant and an assistant United States

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[14] This opinion followed remand from this Court, which vacated New Mexico's prior reversal of the conviction and directed reconsideration in light of *Lee*. A concurring opinion by Justice Rehnquist, joined by then-Chief Justice Burger, Justices O'Connor and Powell, stated that *Lee* had made clear that to the extent *Douglas* interpreted the Confrontation Clause to require an opportunity for cross-examination prior to admission of a co-defendant's statement, it was no longer good law. Accordingly, the state was entitled to attempt to overcome the presumption of unreliability which attaches to a co-defendant's statement by demonstrating that the particular statement at issue has sufficient indicia of reliability to satisfy that concern. *New Mexico v. Earnest*, 477 U.S. 648, 649-650 (1987).

attorney. The declarant said the defendant had supplied him with cocaine several times during the year and had been present when declarant sold drugs to the agent. The declarant refused to testify at trial, and the agent's testimony of his statements was admitted.

The Ninth Circuit said that in applying the exception, each statement must solidly inculpate the declarant and be one that a reasonable person in the declarant's position would not have made unless believing it to be true. *Id.*, at 407. Here the statements were not sufficiently against the declarant's interest because the government offered inducements for him to cooperate. Moreover, the statements trivialized the declarant's role by pointing to the defendant as the kingpin. *Id.*, at 409.

Analogously, in *United States v. Bailey*, 581 F.2d 341 (3rd Cir. 1978) the declarant named his accomplice as the other participant in a bank robbery pursuant to an agreement with the government. The circuit court found that the declarant's motive was to help himself because of lenient treatment promised in the agreement. *Id.*, at 345-346, fn.4.

A statement was excluded for a similar reason in *People v. Morgan*, 76 N.Y.2d 493, 562 N.E.2d 485, 561 N.Y.S.2d 409 (1990). The declarant was arrested following the sale of half a kilo of cocaine to an undercover officer. The declarant agreed to testify at the grand jury pursuant to an agreement that he would receive a lesser term. He testified to the grand jury that he was only acting as a go-between for the defendant. He refused to testify at trial, and his statement was read there.

The New York Court of Appeals held that a declarant's penal interest must be of sufficient magnitude or consequence so as to eliminate the probability of a motive to misrepresent the facts. *Id.*, at 487. Here the grand jury testimony was not sufficiently and imminently against his penal interest to satisfy the core reliability prerequisite for admission. *Id.*, at 485. Moreover, the conditional nature of the criminal charges against him gave the declarant a motive to minimize his role, which he did in describing himself only as a courier. *Id.*, 562 N.E.2d at 488.

3. Voluntariness

In the cases discussed above in which the declarant was in custody when the statement was made, the fact that the declarant was advised of his or her constitutional rights, waived those rights, and made the statement voluntarily was cited by the court as a basis for admission. *Garcia* at 1421, *Garris* at 633, *Vernor* at 1188, *Earnest* at 540, *Taylor* at 75.

4. Custody

The Advisory Committee's Notes state that custody "may" be a factor in determining whether a statement qualifies as a declaration against penal interest. Proposed Rules, 56 F.R.D. at 328 (citing *Bruton*). However, the majority of courts do not accord a conclusive effect to that fact. See, e.g. *Rice v. Marshall*, 709 F.2d 1100, 1004 (6th Cir. 1983), cert. denied 465 U.S. 1034. In *Lee* this Court did not make a *per se* rule that any declaration made in custody was inadmissible. *Id.*, at 544. Rather, as the cases discussed above note, custody is a factor which raises concerns of inducements for declarants to say things which are not true, but it is not the determinative issue.

In contrast, the Fifth Circuit has come to the conclusion that any declaration made in custody must be excluded. The cases by which it reached this proposition are not well reasoned.

United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978), demonstrates the jaundiced eye with which the Fifth Circuit views inculpatory declarations against penal interest. In that case Jose Lopez pled guilty, received probation, and testified that Lucio Mejorado told him that defendant was his drug supplier. The Fifth Circuit excluded the statement. After finding Mejorado's statement was sufficiently against his penal interest (*id.*, at 699-700), it held that the trustworthiness of Lopez' testimony had not been sufficiently established since he presumably testified in the hope of receiving preferential treatment. *Id.*, at 701. That is not the correct test for admitting hearsay evidence. The test of Lopez' credibility was cross-examination, just like the credibility of any other

witness, not presumption. The hearsay issue was the reliability of Mejorado's statement.

The second factor relied upon by the court for exclusion was the "virtual dearth of circumstances corroborating the declaration." Rule 804(b)(3) requires corroboration only for exculpatory declarations.[15]

In *Sarmiento-Perez*, the Fifth Circuit declared that a custodial confession of a non-testifying, separately tried co-conspirator/codefendant which directly implicates the accused under Rule 804(b)(3) is always inadmissible. This holding was based on *Douglas* and the dissent in *Bruton*. The *Sarmiento-Perez* court observed that the first two drafts of Rule 804(b)(3) discussed *Douglas* and *Bruton* and expressed concern that a statement made in custody might be motivated by a desire to curry favor. The court concluded that Rule 804(b)(3) should be interpreted to include the prohibition rejected by Congress: that the against penal interest exception does not include a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused. *Sarmiento Perez*, at 1094-1095.

Thus, the Fifth Circuit rejected the required case-by-case determination of whether a statement is against interest, and instead announced a *per se* exclusion of all statements which are made in custody. It deviated from the intent of Congress and from the rationale for admission of declarations against penal interest.

In *United States v. Flores*, *supra*, the Fifth Circuit held that declarations against penal interest do not constitute a firmly rooted exception to the hearsay rule. *Id.*, at 775-776, fn. 13, 779. Instead it found that confessions of accomplices are presumptively unreliable because they may be the product

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[15] The *Alvarez* court relied on *United States v. Barrett*, 539 F.2d 244 (1st Cir. 1976) and *United States v. Thomas*, 571 F.2d 285 (5th Cir. 1978) for the corroboration requirement. Both cases cited involved exculpatory declarations.

of the declarant's desire to shift or spread blame, curry favor, avenge himself or divert attention to another. *Id.*, at 775-776. Again, this is a rejection of the-by-case analysis of the evidence in favor of a *per se* rule of exclusion.

The position of the Fifth Circuit diverges from other circuit and state court decisions. In the cases discussed in sections II-B-1 through II-B- 3 that involved statements made in custody to police, the fact of custody was not determinative.[16]

The Fifth Circuit is wrong in finding that custody is determinative. If a statement is truly against penal interest, which means that it is not made for the purpose of obtaining an advantage, there is no reason it should not be admitted regardless of the custody status of the declarant.

C. Reginald Harris' Statements Met the Requirements to be Admitted as Declarations Against Penal Interest.

Based on the rule, the rationale for the exception and the history of case law applying it, Reginald Harris' statements were properly admitted as declarations against penal interest.[17]

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[16] See also, *State v. St. Pierre*, *supra*. There two participants in a murder confessed to police and named the defendant as their accomplice. Based on the circumstances surrounding the making of the statements, the Washington Supreme Court upheld their admission. *Id.*, at 387-389. There were two murders in this case and the court excluded the statement as to the second murder because in it the declarant sought to diminish his liability by claiming he tried to help the victim.

[17] Amici agree with the statement of facts of the United States and do not repeat those facts herein. Instead, amici simply refer to the key facts relevant to amici's argument.

First, the declarations were truly against Harris' penal interest. The trial judge specifically found Harris' statements clearly implicated him, and therefore were against his penal interest. JA 51. In both accounts Harris admitted that he knew that cocaine was in his vehicle, that he drove the vehicle and was transporting cocaine to be delivered to another person. This was a knowing admission of trafficking in commercial quantities of cocaine. It was against Harris' penal interest. A reasonable person would not have made the statements unless he believed it was true. It was made under circumstances - to law enforcement - that Harris knew would be damaging. They were the type of statements that would be admitted against Harris when he was prosecuted. McCormick on Evidence, at p. 344. In fact, the government sought to use the statements against him.

Secondly, the statements were voluntary. The record shows contact with Agent Walton was initiated by Harris. Harris had told Walton that he had requested Agent Stephens contact him to arrange for a controlled delivery of the cocaine. JA 54. After Harris was transported to the Marshal's Service office in Macon, Walton advised his of his constitutional rights, which Harris waived. JA 37-38, 43. The entire interview was no more that 20 to 30 minutes in length. JA 43.

Third, the statement was not obtained in exchange for a promise of leniency or as part of plea negotiations.[18] No promise was made by Agent Walton. Agent Walton testified at the hearing on admission of the statements:

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[18] Petitioner attempt to preempt this argument by contending "because Harris was left to fantasize about what benefit he might possibly secure, his incentive to curry favor was even greater than had his interrogators specified the limits upon what benefit he might achieve." Pet. Br., p. 26, fn 9. While it is perfectly appropriate to hold the government responsible for what it says, to fix responsibility on the possibility of declarant's delusions strains credulity.

Q What promises did the agent [Stephens] made as to what reward Harris would receive for cooperation in this case?
A It is my understanding Agent Stephens provided him with no promise of any reward of any type for his cooperation.
Q Didn't Agent Stephens tell Harris that if he cooperated, that it would be documented on his behalf and relayed to the Assistant United States Attorney that would be handling this matter?
A I believe he did say that, as well as myself having said the same thing when he arrived here.
Q What does that mean? Does that mean you are going to give this information, and doesn't that normally dissolve (sic) itself into lenient treatment on behalf of the Assistant United States Attorney's Office?
A No, sir. I think it is exactly what it says.
JA 26.

In fact Harris was prosecuted for, and convicted of, precisely the same offenses as petitioner.

Fourth, the statements did not attempt to shift blame. Harris fully acknowledged his role in the knowing transportation of cocaine. He was not just a "mule" or a courier, as his statements and evidence showed that he previously knew petitioner from Atlanta (JA 28), knew petitioner well enough to be frightened of him (JA 30), the car in which Harris was apprehended had been leased in Atlanta (which was in the direction Harris had been traveling) with petitioner's name on it, and there was an envelope addressed to petitioner in the car. Tran. 83-84, 101-102, exhs. 3, 11.

While it could be argued that Harris assigned a larger role in the conspiracy to petitioner than himself, the issue is whether the statements were more disserving than self serving. That requires a balancing test. Here, on balance the statements were greatly more inculpatory of Harris than exculpatory of him.

Reginald Harris' statement met the requirements of a declaration against penal interest. Since a declaration against penal interest is a firmly rooted exception to the hearsay rule, the statement was properly admitted.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

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Respectfully submitted,

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